BEFORE THE
TENNESSEE STATE BOARD OF EQUALIZATION

In Re:	Tennessee Valley Propane Gas, Inc. District 3, Map 83, Control Map 83, Parcel 83.17, Special Interest P001 Commercial Personal Property Tax year 2002	)))))	Rhea County

INITIAL DECISION AND ORDER

Statement of the Case

The Rhea County Board of Equalization ("county board") has valued the subject property for tax purposes as follows:

APPRAISAL	ASSESSMENT
$220,723	$66,217

On July 5, 2002, the State Board of Equalization ("State Board") received an appeal by the taxpayer.

The undersigned administrative judge conducted a hearing of this matter on August 22, 2007 in Nashville.[1] The appellant Tennessee Valley Propane Gas, Inc. ("Tennessee Valley") was represented by Joseph W. Gibbs, Esq., of Boult, Cummings, Conners & Berry, PLC (Nashville). Without objection by Mr. Gibbs, the State Division of Property Assessments (DPA) was allowed to intervene in the proceeding. Robert T. Lee, General Counsel to the Comptroller of the Treasury, appeared on DPA's behalf. The Rhea County Assessor of Property ("Assessor") did not attend the hearing.

Findings of Fact and Conclusions of Law

Background. In 1990, for better or worse, the Tennessee General Assembly enacted a law uniquely mandating that most leased personal property in this state be "classified according to the lessee's use and assessed to the lessee." Public Acts of 1990, Chapter No. 1075, section 6 (codified in Tenn. Code Ann. section 67-5-502(c)). The instant case joins the growing line of appeals before the State Board that have turned on the issue of whether tangible personal property is "leased" within the meaning of this statute. Alas, because virtually all of the purportedly leased property in question here is in household use, such property would generate measurable tax revenue only if it is deemed to be assessable to the owner.[2]

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[1]Two previously scheduled hearings of this case were continued by mutual consent of the parties. The last document constituting part of the record in this proceeding – a post-hearing brief in defense of the disputed assessment – was received by the State Board on October 18, 2007.

[2]According to Tenn. Code Ann. section 67-5-901(a)(3)(A), all tangible personal property not subclassified as public utility or commercial/industrial property "shall be deemed to have no value."

Tennessee Valley is a licensed "dealer" regulated by the Liquefied Petroleum Safety Act of Tennessee (Tenn. Code Ann. sections 68-135-101 *et seq.*, hereinafter referred to as the "Act"). In that capacity, the company engages in the sale and delivery of liquefied petroleum gas ("LP gas") and the sale and installation of LP gas equipment (i.e., storage tanks). Tennessee Valley's principal place of business is located at 202 Commercial Lane in Dayton.

Some of Tennessee Valley's customers elect to buy LP gas storage containers from the company – either by payment of the purchase price in full or installment sale contract. As the owners of such equipment, those persons may lawfully purchase LP gas from any vendor. But section 68-135-108(a) of the Act states that:

> In order to promote the public safety by avoiding the contamination of containers and by assuring the proper reconditioning of service valves and containers, all dealers shall be required to mark, label or otherwise designate liquefied petroleum gas containers in such a manner as to identify such containers as being owned by the particular dealer, and **no dealer shall sell, install, fill, refill, deliver or permit to be delivered, or use in any manner any liquefied petroleum gas container, unless such container is owned by such dealer or its use is authorized by the owner of such container**. [Emphasis added.]

Though not addressed to the consumer, this statute effectively precludes persons to whom Tennessee Valley purportedly *leases* or *rents* LP gas storage tanks from having them filled (or refilled) by any other dealer without the company's permission. Tennessee Valley commonly employs two types of contract forms for those customers: a Gas Supply and Equipment Rental Agreement (mainly for residential use), which calls for payment of a small monthly "rental fee" as well as a delivery/set up fee; and a Gas Purchase and Equipment Lease Agreement (mainly for commercial use), which specifies a "lifetime lease and set up and delivery fee per tank installation." Under these agreements, which may be terminated by either party upon just three (3) days written notice, the customer is responsible for payment of any personal property tax on the identified equipment.

Both of the above agreements charge the customer an additional fee for failure to purchase at Tennessee Valley's "current market price" a specified minimum quantity of LP gas ("minimum usage") during each twelve-month period following the date of installation.[3] Among the events deemed to be breaches of these agreements are: (1) failing to purchase from Tennessee Valley during any twelve-month period at least as much LP gas as the "leased" or "rented" tank will hold; (2) permitting any other person or firm to use or service such equipment; and (3) violating any term of the agreements, such as by moving the installed equipment without the written consent of Tennessee Valley. In the event of a breach, the company is authorized to terminate the contract and remove its equipment from the customer's premises.

According to Tennessee Valley General Counsel Eric Gibson, the minimum usage requirement serves the business objective of matching the size of the "leased" or "rented" LP

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[3]Tennessee Valley charges lower LP gas prices for customers who own their own tanks. The amount of any additional "minimum usage" fee due is based on the shortage in the quantity of gas purchased.

gas storage container with the customer's needs. Toward this end, the company conducts an annual review of its customers' usage patterns. In practice, Mr. Gibson testified, the company typically "downsizes" a non-complying customer by substituting a smaller tank for the one originally installed on the site.[4]

Tennessee Valley delivers LP gas to its customers by truck. The gas is dispensed by simply connecting a hose to the input valve of the tank. Though visually inspected whenever filled, the tanks themselves require – in Mr. Gibson's words – "practically no maintenance."

Stipulations. The parties have agreed that the subject property is not assessable to Tennessee Valley insofar as, on January 1, 2002, such property was: (a) not located within Rhea County; or (b) not owned by Tennessee Valley, but held for sale on consignment.

Contentions of the Parties. Mr. Gibbs characterized the arrangement described in the aforementioned agreements as a lease or rental of equipment incident to the sale of LP gas. Citing Hyatt v. Taylor, 788 S.W.2d 554 (Tenn. 1990), he argued that the appellant "does not maintain the continuous supervision and control over the tanks necessary to cause Tennessee Valley to be the user of the tanks rather than the lessor of the tanks." Post-Hearing Brief, p. 9. Mr. Lee, on the other hand, considered the subject property to be used by Tennessee Valley in providing a service to its customers – namely, the periodic delivery of LP gas.

Applicable Law. Article II, section 28 of the Tennessee Constitution provides that "all property real, personal or mixed shall be subject to taxation" unless exempted by the legislature. Further, "the Legislature may levy a gross receipts tax on merchants and businesses in lieu of ad valorem taxes on the inventories of merchandise held by such merchants and businesses for sale and exchange."

With the notable exception of leased personal property, property in this state is generally assessable to the owner thereof as of January 1. Tenn. Code Ann. section 67-5-502(a)(1). All business and professional entities must report annually to the assessor of property on the prescribed form "all tangible personal property owned by the taxpayer and used or held for use in such business or profession including, but not limited to, furniture, fixtures, machinery and equipment, all raw materials, supplies, but excluding all finished goods in the hands of a manufacturer and the inventories of merchandise held for sale and exchange." Tenn. Code Ann. section 67-5-903(a).

As the party seeking to change the current assessment of the subject property, Tennessee Valley has the burden of proof in this administrative proceeding. State Board Rule 0600-1-.11(1).

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[4]Conversely, Tennessee Valley may "upsize" a customer who appears to need a larger storage container.

Analysis. A *lease* of tangible personal property "means a contract by which one owning such property grants to another the right to possess, use and enjoy it for a specified period of time in exchange for periodic payment of a stipulated price, referred to as rent." *Black's Law Dictionary* (6th ed. 1990), p. 889. *See also* Nissan North America, Inc. v. Haislip, 2004 WL 1088779 (Tenn. Ct. App.). The fact that an agreement may be called a "lease" or "rental" does not, of course, necessarily assure treatment of it as such for property tax purposes.

In Hyatt v. Taylor, *supra*, a taxpayer who sold, leased, and serviced water conditioning units claimed exemption from state sales and use taxes on the basis of Tenn. Code Ann. section 67-6-204(b). That subsection reads (in relevant part) as follows:

> If the owner of the property maintains continuous supervision over the personal property being leased or rented, and furnishes an operator or crew to operate such property, the owner is rendering a service, and the service is not subject to sales or use tax. On the other hand, if the owner does not furnish the crew or operator, but merely rents the property, and the lessee operates it personally for a stated consideration or price, either by the day or week or month, in such case, the sales or use tax would apply as the lessee has the possession, use and control of the property.

The Supreme Court of Tennessee rejected the taxpayer's claim, finding that:

> ...[T]he leased property "works by itself" and such "operation," as is required to cause it to produce the result it is designed to accomplish, is performed by the user turning on a water faucet. The taxpayer's two service men do not qualify as operators of six or seven hundred water treatment units located on the property of lessees over a fifty-mile radius from taxpayer's business.

Id. at 556.

Likewise, counsel for Tennessee Valley asserts, the LP gas tanks assessed here are operated and controlled by its customers. But as Mr. Gibbs acknowledged, the statute which dictated the outcome in Hyatt has no analogue in the realm of property taxation. Further, in that case, the water conditioning equipment in question was undisputedly leased; the only issue was whether the taxpayer fell within the strictly-construed statutory exemption. Moreover, Tennessee Valley's customers cannot readily be said to "control" the storage containers installed by the company when they cannot even move them without its permission.

In the opinion of the administrative judge, then, we must look to the State Board's ORDER ON REVIEW OF PRELIMINARY LEGAL ISSUES in Memphis CATV (Time Warner Entertainment Co., LP) (Shelby County, Tax Years 1999—2000, March 15, 2005) for authoritative guidance in this matter. Upon its review of the record, the State Board determined in Memphis CATV that the converter boxes and remote controls in dispute were leased by a cable television service provider to its customers, and thus not assessable to the company. But the State Board pointedly cautioned in a footnote that:

> ...[T]his conclusion is not required in all circumstances. For example, equipment which a taxpayer must necessarily obtain from Time Warner in order to utilize particular Time Warner services, may be considered for assessment purposes to be so subsumed within the service that the existence of a true lease is refuted. Such equipment, not apparently at issue here, may still

> perhaps be considered business equipment of a service provider for assessment purposes rather than a consumer product available for lease or purchase.

Id. at p. 3.

This comment turned out to be prophetic in EchoStar Satellite, LLC (Shelby County, Tax Year 2004, Initial Decision and Order, September 22, 2006), where the taxpayer contested the assessment of its satellite television receivers and related equipment. While admitting that such property had no utility other than for the reception of its DISH Network programming, the company maintained that this equipment was held for "lease" to its customers.

But the proof in Memphis CATV had indicated that the taxpayer's cable television subscribers could procure the required converter boxes from other sources. By contrast, "[f]or all practical purposes...EchoStar was the sole supplier of the sophisticated technical equipment necessary for receipt of DISH Network programming." EchoStar Satellite, LLC, *supra*, p. 4. EchoStar's standard customer agreement also prohibited any relocation of the installed equipment, as well as any maintenance or repair thereof by unauthorized personnel. Based on these distinguishing factors, the administrative judge deemed the company to be "largely in control of what amounts to business equipment." *Id.* at p. 5. *See also* Sonitrol of Memphis, Inc. (Shelby County, Tax Years 1996—1998, Initial Decision and Order, August 4, 2000).

To be sure, a person wishing to purchase LP gas from Tennessee Valley has the option of buying his or her own tank instead of "renting" or "leasing" one from the company. However, no one may "rent" or "lease" a tank from Tennessee Valley without committing to purchase LP gas from the company. Several other considerations militate against acceptance of the appellant's position in this case. Tellingly, by Mr. Gibson's own admission, Tennessee Valley has habitually waived the nominal "monthly rental" and "lifetime lease" fees mentioned in its agreements – focusing most of its attention on the amount of LP gas purchased by the customer. Secondly, the customer may forfeit the very right to "possess, use and enjoy" the purportedly leased property (tank) merely by not buying – or buying enough of – another product (LP gas) from the corporation. Finally, the appellant's contention that it "does not use the tanks to provide a service" (Post-Hearing Brief, p. 9) ignores Tennessee Valley's sole responsibility for the safe delivery of LP gas to its customers as well as the proper installation and maintenance of the equipment in which that product is stored.

Order

Within ten (10) days after the date of entry hereof, the parties shall notify the administrative judge in writing of the appropriate adjustment (if any) to the present valuation of the subject property in light of the aforementioned stipulations. Except as so modified, the decision of the county board is affirmed.

Pursuant to the Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-301—325, Tenn. Code Ann. § 67-5-1501, and the Rules of Contested Case Procedure of the State Board of Equalization, the parties are advised of the following remedies:

1. A party may appeal this decision and order to the Assessment Appeals Commission pursuant to Tenn. Code Ann. § 67-5-1501 and Rule 0600-1-.12 of the Contested Case Procedures of the State Board of Equalization. Tennessee Code Annotated § 67-5-1501(c) provides that an appeal **"must be filed within thirty (30) days from the date the initial decision is sent."** Rule 0600-1-.12 of the Contested Case Procedures of the State Board of Equalization provides that the appeal be filed with the Executive Secretary of the State Board and that the appeal **"identify the allegedly erroneous finding(s) of fact and/or conclusion(s) of law in the initial order"**; or

2. A party may petition for reconsideration of this decision and order pursuant to Tenn. Code Ann. § 4-5-317 within fifteen (15) days of the entry of the order. The petition for reconsideration must state the specific grounds upon which relief is requested. The filing of a petition for reconsideration is not a prerequisite for seeking administrative or judicial review.

This order does not become final until an official certificate is issued by the Assessment Appeals Commission. Official certificates are normally issued seventy-five (75) days after the entry of the initial decision and order if no party has appealed.

ENTERED this 28th day of December, 2007.

Pete Loesch

PETE LOESCH
ADMINISTRATIVE JUDGE
TENNESSEE DEPARTMENT OF STATE
ADMINISTRATIVE PROCEDURES DIVISION

cc: Joseph W. Gibbs, Attorney, Boult, Cummings, Conners & Berry, PLC
Robert T. Lee, General Counsel to the Comptroller of the Treasury
Julene Purser, Rhea County Assessor of Property

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